Filed 8/25/04 In re Maurice B. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re MAURICE B., a Person Coming Under the Juvenile Court Law. SAN FRANCISCO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent. v. ELIZABETH S. et al. Defendants and Appellants.	A104620 (San Francisco County Super. Ct. No. JD033013)

Elizabeth S. and Maurice B. separately appeal the judgment terminating their parental rights, contending they have a beneficial relationship with their son.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2003, three-month-old Maurice was brought to the hospital suffering from three fractures of the left leg, including two metaphyseal lesions that were "classic and specific for child abuse." The injuries were produced by substantial force and caused acute pain. Maurice was detained and an amended petition was filed alleging that he

[1] On its own motion, the court hereby consolidates the two appeals.

came within Welfare and Institutions Code section 300, subdivisions (a), (b) and (e).[2] Allegations of the petition were found true after a contested hearing and dependency was declared. An-out-of home placement was ordered because the parents' explanations of the injuries were implausible, and because they had problems with anger management and possibly substance abuse. The court also ordered no reunification services, finding that services would not be likely to prevent re-abuse. A permanency planning hearing pursuant to section 366.26 was scheduled. The court denied parents' request for a reconsideration of its orders. Each parent filed a petition for extraordinary relief, which we denied in an unpublished opinion. (*Elisabeth S. v. Superior Court* (Sept. 30, 2003, A103535) [nonpub. opn.].)

The contested section 366.26 hearing occurred on November 14, 2003. The parents, who are unmarried, were no longer living together. Mother appeared; father did not. According to the report of the social service agency, Maurice began residing with the proposed adoptive mother, Mia. C., shortly after he was detained. Mia is a family friend with whom the parents have a "healthy relationship." Mother visited the child at least once a week, often staying an entire Saturday or Sunday. In late summer, mother visited both weekend days. Until October, when he was working out-of-state, father visited approximately three times a month, staying from five to seven hours on the weekend. Both parents were appropriate with Maurice, feeding and playing with him in Mia's presence. The baby was comfortable with both parents, although he sought out Mia when he was fussy or cranky. The parents participated in the Family Trauma Project, a program designed to give them "information and insight" about babies and toddlers.

According to mother's offer of proof, she saw Maurice every week and attended the Family Trauma Project with him. Maurice was always happy to see her and had recently called her "Mama."

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[2] All statutory references are to the Welfare and Institutions Code.

While the social service agency recognized that mother and father were learning more about Maurice's needs, it nevertheless recommended that parental rights be terminated, noting that the parents never assumed responsibility for the baby's injuries nor understood their serious nature. The report indicated that Maurice is very bonded to his prospective adoptive family and that they are committed to providing him a loving and supportive home.

The juvenile court found that Maurice was adoptable and that no exception to the preference for adoption applied. It ordered termination of mother and father's parental rights.

DISCUSSION

Mother and father contend the court erred in terminating parent rights because they had a beneficial relationship with Maurice within the meaning of section 366.26, subdivision (c)(1)(A).

A. *Judicial Interpretation of Section 366.26, subdivision (c)(1)(A)*

"By the time of a section 366.26 hearing, the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount. [Citations.]" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*).) Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) Section 366.26, subdivision (c)(1) provides that if the juvenile court finds the child adoptable, the court shall terminate parental rights and order the child placed for adoption. Once a parent has failed to reunify and the juvenile court has determined that the child is likely to be adopted, the decision at a section 366.26 hearing to terminate parental rights is "relatively automatic." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 250.)

As relevant to this case, section 366.26, subdivision (c)(1)(A) prescribes that the denial of reunification services "shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (A) The parents . . . have maintained regular visitation and contact with the child and the

child would benefit from continuing the relationship." The burden of proving this exception is on the parents. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.)

The *Autumn H.* court noted that "[i]nteraction between natural parent and child will always confer some incidental benefit to the child." (*Autumn H.*, *supra*, 27 Cal.App. 4th at p. 575.) The exception under section 366.26, subdivision (c)(1)(A) applies only when the relationship with the natural parent "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Ibid*.) Only if "severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed [is] the preference for adoption . . . overcome [so that] the natural parent's rights are not terminated." (*Ibid.*) The existence of this relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." (*Id.* at p. 576.)

The court in *In re Beatrice M.* (1994) 29 Cal.App.4th 1411 (*Beatrice M.*), agreed with the *Autumn H*. analysis, and held that even "frequent and loving contact" by parents with their children is insufficient to establish the necessary benefit from continuing the relationship, when parents "had not occupied a parental role in relation to them at any time during their lives." (*Beatrice M*., *supra*, at pp. 1418-1419.) The relationship must be more than merely friendly or familiar. (*Jasmine D*., *supra*, 78 Cal.App.4th at p. 1350.) "Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*Ibid.*)

Parents argue that courts in *Autumn H.*, *supra,* 27 Cal.App.4th 567 and its progeny have misconstrued the plain meaning of section 322.66, subdivision (c)(1)(A). They argue that these courts, by requiring the balancing test of *Autumn H*., and by ruling that

parents must stand in a "parental" role for the exception to apply, have imposed requirements not contained in the statute.

In *Jasmine D.*, *supra*, 78 Cal.App.4th 1339, an opinion by Justice Parrilli of this court, we thoroughly examined these same contentions. We analyzed the Legislature's revisions to the statutory scheme, and considered the beneficial relationship exception in view of the legislative preference for adoption once reunifications efforts have failed. We observed that the section 366.26, subdivision (c)(1)(A) exception applies only when the benefit to the child from maintaining the parental relationship constitutes "a compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1).) We stated that this statutory provision "makes it plain that a parent may not claim entitlement to the exception provided by subdivision (c)(1)(A) simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*Jasmine D.*, *supra*, at p. 1349.)[3] Construing section 366.22 in the context of the statutory scheme, we agreed that a balancing test "is obviously appropriate" in deciding whether a child would be so harmed by terminating a relationship with a natural parent that the legislative preference for adoption should not go forward. (*Id.* at p. 1348.) Moreover, we concluded that *Autumn H.* and its progeny, including *In re Casey D.* (1999) 70 Cal.App.4th 38, properly interpreted the burden facing parents who wish to establish the section 366.26, subdivision (c)(1)(A) exception. (*Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1348-1350.) In view of our opinion in *Jasmine D.*, we will not revisit parents' arguments here.

B. *Sufficiency of the Evidence*

In reviewing a juvenile court's failure to apply the section 366.26 (c)(1)(A) exception, an appellate court must "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party

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[3] As we explained in *Jasmine D.*, *supra*, 78 Cal.App.4th at page 1349, this statutory language was added by the Legislature in 1998. Mother's reference to a single page of a 1988 legislative history document, concerning the former version of the statute, is not persuasive.

the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*Autumn H., supra*, 27 Cal.App.4th at p. 576.) An appellate court can overturn an order terminating parental rights only if the order constitutes an abuse of discretion. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

The court did not abuse its discretion in terminating parental rights. At the time of the section 366.26 hearing, Maurice was more than a year old and had not lived with his parents since the age of three months. During those 90 days, the baby suffered three serious leg fractures that neither parent sufficiently appreciated nor explained. At the section 366.26 hearing, mother continued to deny responsibility for the baby's injuries and posited a new theory as to how Maurice suffered his fractures.[4] The record shows that both parents regularly visited Maurice under supervision and were caring and attentive. Although Maurice turned to his prospective adoptive mother when he was irritable and upset, he was generally comfortable with the parents.[5] The record does not indicate, however, that the relationship with his parents "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Maurice was very bonded with Mia, having spent the vast majority of his very young life in her care. The baby was reported as happy and healthy. The social worker described

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4 Mother claimed that one of two babysitters could have inflicted the injuries, but admitted that she never provided this information to the treating physician when Maurice was brought to the hospital. Mother and father initially reported that the baby's leg was injured as a result of being bent in the car seat. The parents denied that they or any other caretaker harmed the child.

5 Mother misstates the record. She quotes the social worker's testimony at the section 366.26 hearing as follows: "[T]here seems to be a good feeling or a good relationship *between the minor and his parents* so that everything seems—the visits seem to be okay." (Italics added.) In fact, the transcript actually states: "[T]here seems to be a good feeling or good relationship *between Mia and the parents*, so that everything seems—the visits seem to be okay." (Italics added.) Mother also states in the opening brief, "[The social worker] testified that the relationship *between minor and his mother* appeared to be positive . . . ." (Italics added.) In fact, the social worker described the relationship *between Mia and the mother* as positive. Such a misstatement of the record exceeds the bounds of legitimate advocacy.

Mia as attentive, nurturing, and committed to providing Maurice a loving and supportive home.[6]

In re Amber M. (2002) 103 Cal.App.4th 681 (*Amber M.*), on which parents rely, is distinguishable. The *Amber M*. minor was seven years old at the time of the section 366.26 hearing and had been in the mother's care for most of her life when parental rights were terminated. A psychologist who conducted a bonding study concluded the mother and child shared a "primary maternal relationship," and severance would be detrimental. (*Id*. at p. 689.) The child's therapist and the court-appointed advocate believed that the relationship should continue because the mother and child shared a strong bond. (*Id*. at pp. 689-690.)

Here, there is no such compelling evidence. Although we are mindful of the parents' efforts and their obvious love of Maurice, we cannot conclude the juvenile court abused its discretion in terminating mother and father's parental rights.

C. *Guardianship as Alternative to Adoption*

Parents contend the juvenile court should have ordered guardianship, which they claim would have been consistent with the court's interest in continued visitation between parents and Maurice. Parents rely on the following comments made by the juvenile court at the conclusion of the section 366.26 hearing: "Here I think you're going to have a situation where the adoptive parent is a friend of the family and will allow that contact to grow. But it will be different from the mother and father contact. It would be a friend of the family type contact." Parents argue that such comments are inconsistent with termination of parental rights.

The law provides that the adoptive and birth parents may enter into "postadoption contact agreements" allowing the birth parents visitation and other contact after adoption.

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6 Parents complain that "apparently no therapist or counselor was consulted at the time of the section 366.26 hearing for a relevant opinion" as to the parent/child bond. They cite no statute requiring such an opinion at the section 366.26 hearing. The social service agency was required to prepare an assessment that included a review of the amount and nature of contacts between the child and parent, and "an evaluation of the child's medical, developmental, scholastic, mental, and emotional status." (§§ 366.21, subd. (i)(2)(3); 366.22, subd. (b)(2)(3).) The agency report satisfied the statutory mandate.

(Fam. Code, § 8616.5.) The juvenile court's remarks appear to be nothing more than an expression of hope that such an agreement for postadoption contact might be reached. The court expressly characterized the parents' future role during these visits as "friend of the family." Nothing in these remarks negates or contradicts the juvenile court's finding that parents failed to prove that the benefit to Maurice from continuing the relationship with them outweighs the benefit of legal permanence through adoption.

DISPOSITION

The order terminating parental rights is affirmed.

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Corrigan, J.

We concur:

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McGuiness, P.J.

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Pollak, J.